IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-131

SEA-LAND SERVICE, INC.,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOHN C. FRICANO
JOHN M. NANNES
SKADDEN, ARPS, SLATE, MEAGHER & FLOM
1775 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Counsel for Petitioner

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The petitioner, Sea-Land Service, Inc. ("Sea-Land" or the "Company") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on March 28, 1979.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix A hereto.[1] No opinion was rendered by the District Court for the District of Columbia.

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[1] In the Court of Appeals, the case was styled *In Re: Grand Jury Investigation of Ocean Transportation, Appellant.*

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on March 28, 1979. A timely petition for rehearing *en banc* was denied on May 1, 1979, (Appendix B) and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

I. Whether the inadvertent production of privileged documents to the Government, in connection with a subpoena duces tecum issued in a grand jury investigation, by an attorney without the authorization and contrary to the instructions of the client, constitutes a waiver of the attorney-client privilege as a matter of law.

STATEMENT OF THE CASE

The Antitrust Division of the Department of Justice ("Government") began a grand jury investigation in 1976 in Washington, D.C. into ocean transportation of freight. In August 1976, grand jury subpoenas duces tecum were issued to Sea-Land and other shipping companies operating in the North Atlantic.[2] The subpoena issued to Sea-Land required the production of documents to the Grand Jury or, in lieu thereof, directly to the Government. It required the production of documents from the Company's files relating to operations between

[2] Sea-Land is one of the world's largest containerized shipping companies. It owns and operates container ships that carry products in sealed containers that can be transported to and from inland points by trucks and railroads. Sea-Land is a member of numerous ocean shipping conferences that have been approved by the Federal Maritime Commission pursuant to Section 15 of the Shipping Act, 46 U.S.C. § 814. Members of those conferences enjoy an exemption from the antitrust laws for conduct authorized by the Federal Maritime Commission.

1972 and 1976 but did not demand the production of privileged documents.

The search of Sea-Land's files and the production of documents were conducted by maritime attorneys (referred to as "original counsel" in the opinion of the Court of Appeals) who had provided legal counsel to Sea-Land for many years, including the period covered by the subpoena. Original counsel was instructed by Sea-Land to produce all documents falling within the scope of the subpoena, but to withhold documents coming within the attorney-client privilege. Sea-Land did not authorize original counsel to produce privileged documents to the Government, and original counsel understood that it had no authority to do so.[3]

Original counsel sought to comply with Sea-Land's instructions by (1) segregating potentially privileged documents, (2) labeling them with a "P" in the upper right-hand corner, and (3) placing them in specially designated manila folders that would be withheld from production. Nevertheless, original counsel failed to comply with Sea-Land's instructions in two critical respects. First, on September 30, 1976, original counsel mistakenly delivered two of the specially designated manila folders containing eleven privileged documents to the Government along with documents intended for production.[4] Second, in ensuing months, original counsel completed

[3] Joint Appendix filed in the United States Court of Appeals for the District of Columbia Circuit ("JA") at 44. Copies of the Joint Appendix have been lodged with the Clerk of this Court.

[4] When original counsel delivered these documents to the Government on September 30, 1976, the Government noticed that certain documents appearing to be privileged and marked with a "P" had been included among the production. Government counsel contacted original counsel to inquire about the matter but original counsel mistakenly concluded, without undertaking to examine the documents, that the documents that had been delivered were intended for production. App. A at 4a-5a.

the production of documents from other Company files and failed to segregate and withhold ten additional privileged documents from the many thousands of documents produced to the Government.

After production had been substantially completed, original counsel began to review copies it had made of the documents produced to the Government. In March 1977, original counsel realized for the first time that privileged documents had been improperly delivered to the Government the previous September. Original counsel met with government attorneys to explain the unauthorized and improper production of the documents, but original counsel never pursued the return of the documents by submitting a formal request or memorandum in support thereof as had been requested by the Government. Original counsel deliberately withheld all of this information from Sea-Land until December 1977. (JA 43-44)

When Sea-Land learned of this unauthorized action, it terminated original counsel's representation, and special antitrust counsel immediately pursued return of the documents from the Government. While negotiations were pending, the Government called a Sea-Land employee before the Grand Jury to question him regarding the privileged documents. The employee asserted the attorney-client privilege, and the matter was brought before the District Court on the Government's motion to compel testimony and Sea-Land's motion for the return of privileged documents. The District Court granted the Government's motion and denied Sea-Land's motion on the grounds that the physical act of production by original counsel constituted a waiver of Sea-Land's privilege as a matter of law.[5]

[5] Thereafter, the employee reportedly answered questions regarding the documents. The transcript of that testimony remains under seal and has not been disclosed to Sea-Land or any person other than government attorneys and the grand jurors who are forbidden by Federal Rule of Criminal Procedure 6(e) from disclosing matters occurring before the Grand Jury.

Sea-Land appealed the denial of its motion to the Court of Appeals. The Company contended that the attorney-client privilege belongs to the client and not to the attorney. Therefore, the unauthorized actions of original counsel could not constitute a waiver of the privilege unless it could be shown that Sea-Land directly participated in the production of the documents or failed to repudiate counsel's action upon learning of the unauthorized act.

The Court of Appeals affirmed the judgment of the District Court. It held that the production of the "P" documents constituted a waiver of the attorney-client privilege because original counsel acted as Sea-Land's agent in the production of documents to the Government. The Court disputed neither the fact that original counsel had been instructed to withhold privileged documents nor the fact that the production had been mistaken. App. A at 4a-5a. Nevertheless, the Court concluded that it would be unfair to require the Government to return documents which it had been using during the investigation. With regard to the ten privileged documents that had not been marked "P", the Court of Appeals also held that Sea-Land was bound by original counsel's actions.

A timely petition for rehearing *en banc* was denied. Thereafter, on June 1, 1979, the Grand Jury returned a one-count indictment charging Sea-Land and others with a violation of Section 1 of the Sherman Act. Sea-Land pleaded *nolo contendere* on June 8, 1979. The plea was accepted, sentence was imposed, and all proceedings between Sea-Land and the Government terminated.

Upon conclusion of the proceedings, Sea-Land requested the Government to return all its documents. The Government returned the original documents on June 12, 1979, but notified Sea-Land that it would retain a complete set

of copies indefinitely. Since that time, the Government has (1) indicated an intention to use the copies in agency proceedings, (2) supported efforts by the Federal Maritime Commission to obtain the copies, and (3) refused Sea-Land's request to return all copies of Company documents, including the improperly produced privileged documents.

REASONS FOR GRANTING THE WRIT

The Decision Below Conflicts with Decisions of Other Courts That Have Rejected Claims of Waiver Predicated Upon Unauthorized Actions of Counsel

It is clearly established law that the attorney-client privilege belongs to the client and not to the attorney. MCCORMICK ON EVIDENCE § 92, at 192 (Cleary ed. 1972). The opinion of the Court of Appeals holds that unauthorized actions of original counsel, in producing privileged documents to the Government, constitute a waiver of that privilege notwithstanding the fact that the client was unaware of such conduct and took all steps available to it to repudiate counsel's action upon learning of the improper production. In so holding, the decision of the Court of Appeals conflicts with decisions of the Second Circuit and the Ninth Circuit in instances involving less egregious attorney errors.

In *International Business Machines Corp.* v. *United States*, 471 F.2d 507 (2d Cir. 1972), *vacated on other grounds*, 480 F.2d 293 (2d Cir.), *cert. denied*, 416 U.S. 979-80 (1973), the Second Circuit refused to hold that the attorney-client privilege had been waived by the inadvertent production of documents by counsel acting pursuant to an accelerated discovery program. That Court did not dispose of the issue on agency grounds but instead indicated that "the real issue [was] are the documents privileged and was there a knowing and voluntary waiver

of the privilege." 471 F.2d, at 511. Similarly, in private antitrust cases involving the same documents, the Ninth Circuit held in *Transamerica Computer Company, Inc.* v. *International Business Machines Corp.*, 573 F.2d 646 (9th Cir. 1978), that the privilege had not been waived by the inadvertent disclosure of privileged documents because the compelled production of documents on an expedited schedule deprived IBM of an effective opportunity to claim the privilege. Circuit Judge Kennedy, concurring, stated that the disclosure of privileged information "by inadvertence even with the exercise of due care" posed a difficult question but that "the privilege would remain." 573 F.2d, at 653.

The Government was unable to cite any relevant authority at the appellate level in support of its proposition that the unauthorized actions of counsel constituted a waiver of the client's privilege. Indeed, in commenting upon the decision, *The Antitrust & Trade Regulation Report* noted: "The District of Columbia Circuit apparently becomes the first federal appellate court to hold that an attorney's inadvertent disclosure of documents—standing alone—can constitute, under circumstances, a waiver of the attorney-client privilege without the knowledge of the client." [6]

The fundamental error in the decision of the Court of Appeals was the failure to recognize the distinction between actions of the client, which may support a finding of waiver, and actions of the attorney, which cannot sustain such a finding. In addition to the Circuits noted, *supra*, numerous lower court decisions have recognized this distinction in fact. In those cases in which the production of privileged communications occurred due to attorney error, without any involvement of the client, the

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[6] Bureau of National Affairs, Inc., The Antitrust & Trade Regulation Report, No. 908 at A-5 (April 5, 1979).

courts have uniformly held that the attorney-client privilege is not waived. *See Connecticut Mutual Life Insurance Co.* v. *Shields*, 18 F.R.D. 448 (S.D.N.Y. 1955); *Dunn Chemical Co.* v. *Sybron Corp.*, 1975-2 CCH Trade Cases ¶ 60,561 (S.D.N.Y. 1975); *SCM Corp.* v. *Xerox Corp.*, 70 F.R.D. 508, 519 (D. Conn.), *appeal dismissed*, 534 F.2d 1031 (2d Cir. 1976); *United States* v. *Aluminum Company of America*, No. 61 C 147 (E.D. Mo. March 20, 1963); *United States* v. *Aluminum Company of America & Rome Cable Corp.*, Civil No. 8030 (N.D. N.Y. December 12, 1961); *United States* v. *Insurance Board of Cleveland*, 1954 CCH Trade Cases ¶ 67,873 (N.D. Ohio 1954); *United States* v. *New Wrinkle, Inc.*, 1954 CCH Trade Cases ¶ 67,883 (S.D. Ohio 1954).[7] In these cases, counsel responsible for the inadvertent disclosure were able to protect their clients by asserting the privilege upon discovery of the error, and the client was not penalized. The same result should certainly pertain in the present case in which original counsel not only made an erroneous disclosure but also compromised the client's interest by withholding that information from the client and failing to seek return of the documents.[8]

Where, by contrast, the client has either made or ordered disclosure, a waiver of the privilege has been found, and the client has not thereafter been permitted to assert the privilege. *See United States* v. *Kelsey-Hayes Wheel Co.*, 15 F.R.D. 461 (E.D. Mich. 1954); *Underwater Storage, Inc.* v. *United States Rubber Co.*, 314 F. Supp.

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[7] Each of these cases was brought to the attention of the Court of Appeals. The unreported decisions were made part of the record and are reproduced in the Joint Appendix. *See* note 3, *supra*.

[8] Under the reasoning of the Court of Appeals, even the *deliberate* and unauthorized disclosure of privileged documents by an attorney, for whatever reason, would bind the client, a result that has been unequivocally rejected. VIII WIGMORE ON EVIDENCE § 2326, at 633 n. 2 (McNaughton rev. 1961).

546 (D.D.C. 1970). The Court of Appeals mistakenly relied upon these two cases without recognizing the critical fact that the present case involves only attorney error.

Other federal courts have looked to the proposed Federal Rules of Evidence, which were approved by this Court although not ultimately adopted by the Congress, to provide a "convenient comprehensive guide to the federal law of privileges as it now stands." *United States* v. *Mackey*, 405 F. Supp. 854, 857-58 (E.D.N.Y. 1975). Proposed Rule 511 provides that a privilege may be waived if the "*holder of the privilege voluntarily* discloses or consents to disclosure of any significant part of the matter or communication." (Emphasis added.) Indeed, the Ninth Circuit relied upon this rule and reached its determination in the *Transamerica Computer* case, *supra*, that the privilege had not been waived. Here, by contrast, the Court of Appeals reached a conclusion at variance with the plain language of the rule.

The development of conflicting laws of privilege among the Federal Circuits creates an unacceptable measure of unfairness and uncertainty to holders of the privilege. The attorney-client privilege is designed to encourage clients to seek legal advice in order to conform their conduct to applicable law. Resort to legal advice is encouraged by the privilege which provides that disclosure of the substance of those communications cannot be compelled except by waiver of the holder of the privilege. The decision of the Court of Appeals fundamentally undermines these interests, contrary to the decisions of other Circuits, by holding that the improper and unauthorized production of privileged communications by an attorney constitutes a waiver of the client's privilege.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the District of Columbia Circuit.

Respectfully submitted,

JOHN C. FRICANO
JOHN M. NANNES
SKADDEN, ARPS, SLATE, MEAGHER & FLOM
Suite 900
1775 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 293-9233

Counsel for Petitioner
Sea-Land Service, Inc.

Dated: July 1979
Washington, D.C.

Appendices

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1539

IN RE: GRAND JURY INVESTIGATION OF OCEAN TRANSPORTATION, APPELLANT

Appeal from the United States District Court for the District of Columbia

(D.C. Miscellaneous No. 76-0162)

Argued February 9, 1979

Decided March 28, 1979

John C. Fricano with whom *John M. Nannes* and *C. Benjamin Crisman, Jr.* were on the brief, for appellant.

John J. Power, III, Attorney, Department of Justice with whom *J. Mark Manner*, Attorney, Department of Justice was on the brief for appellees.

Before: TAMM and ROBINSON, *Circuit Judges* and GERHARD A. GESELL*, *United States District Judge* for the United States District Court for the District of Columbia

Opinion Per Curiam.

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* Sitting by designation pursuant to 28 U.S.C. § 292(a).

Per Curiam: The District Court denied a motion of Sea-Land Services, Inc. ("Sea-Land") for the return of various documents which Sea-Land alleges are protected by the attorney-client privilege but which were inadvertently disclosed to the Antitrust Division of the United States Department of Justice in the course of responding to a grand jury *duces tecum* subpoena. Sea-Land appeals. In response, the Government questions this Court's jurisdiction and asserts that, in any event, the District Court's order must be sustained because any privilege that existed as to these documents has been effectively waived. Accepting jurisdiction, we affirm.

I.

The Government contends that the order of the District Court is purely interlocutory, representing only a phase of a larger proceeding and that the holding in *Cobbledick* v. *United States*, 309 U.S. 323 (1940), bars review at this stage. When Sea-Land sued in the District Court, however, it had not for some time enjoyed possession of the documents. Consequently, it could not have pursued the traditional route for contesting the order by standing in contempt.* Therefore, the rationale of *Perlman* v. *United States*, 247 U.S. 7 (1918), not of the *Cobbledick* case, applies. *See Cobbledick* v. *United States*, *supra*, 309 U.S. at 328-29; *Nixon* v. *Sirica*, 487 F.2d 700, 721 n.100 (D.C. Cir. 1973) (en banc).

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* The District Court ordered Mr. Halloran, an officer of Sea-Land, to testify as to the allegedly privileged documents. The Government maintains that the contempt route remained open since Sea-Land could have required Mr. Halloran to stand in contempt rather than testify. This claim must fail. That order ran against the employee, not against the company. Moreover, the officer was represented by his own counsel and, at least from the record, appears to have been unwilling to risk a contempt citation for Sea-Land's benefit. In these aspects, this case differs from *Shattuck* v. *Hoegl*, 523 F.2d 509, 512-13, 516 (2d Cir. 1975).

The present appeal also fits within the standards established by the Supreme Court for the review of "collateral" orders under 28 U.S.C. § 1291. *See Coopers & Lybrand* v. *Livesay*, 46 U.S.L.W. 4757, 4759 (June 21, 1978); *Abney* v. *United States*, 431 U.S. 651, 656-62 (1977); *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 169-72 (1974); *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-47 (1949). The District Court's order conclusively determined the question of waiver. Nothing in the record suggests that the District Court regarded its ruling as either tentative or incomplete. Such further proceedings as will be conducted by the Justice Department in this case will also not be likely to develop any factual issue relevant to the attorney-client issue now before this Court. *See United States* v. *MacDonald*, 435 U.S. 850, 858-59 (1978). Secondly, appellate review will resolve an important issue completely separate from and collateral to the merits of the ongoing grand jury proceeding. *See United States* v. *Alexander*, 428 F.2d 1169, 1171 (8th Cir. 1970); *Coury* v. *United States*, 426 F.2d 1354, 1355 (6th Cir. 1970); *Goodman* v. *United States*, 369 F.2d 166, 167-68 (9th Cir. 1966); *Gottone* v. *United States*, 345 F.2d 165 (10th Cir.), *cert. denied*, 382 U.S. 901 (1965). No criminal trial is pending, *see DiBella* v. *United States*, 369 U.S. 121, 131-32 (1962); *In re Grand Jury Empaneled January 21, 1975*, 536 F.2d 1009, 1011 n.1 (3d Cir. 1976); *In re Investigation Before April 1975 Grand Jury*, 531 F.2d 600, 605 n.8 (D.C. Cir. 1976); nor is any delay or obstruction of the grand jury proceeding threatened by the instant appeal. Finally, Sea-Land must pursue its claim of attorney-client privilege at this time in order to ensure that its claim not later become moot by reason of the documents' disclosure to third parties. Absent the present appeal, these documents could be read or shown in the course of the grand jury proceedings to witnesses who would then be free under Fed. R. Crim. P. 6(e) to disclose them. Barring

an appeal at this stage might therefore subject Sea-Land to the irreparable loss of its right to claim the attorney-client privilege. Practical rather than technical considerations must control in this area. *Cohen* v. *Beneficial Industrial Loan Corp.*, *supra*, 337 U.S. at 546. Accordingly, we hold that jurisdiction to review the District Court's final order lies under 28 U.S.C. § 1291. Thus the issue of waiver is squarely presented.

II.

A brief recital of the facts is all that is necessary. It is undisputed that the United States has acted from the outset in complete good faith. Upon receipt of the subpoena in August 1976, Sea-Land instructed its counsel ("original counsel") to withhold from production all documents which were felt might be covered by the attorney-client privilege. On September 30, 1976, said counsel responded to the subpoena and turned over two groups of documents which Sea-Land's current counsel are now claiming were protected by the privilege.

One group need not detain us any further. For whatever reason, original counsel did not mark these papers as potentially privileged and voluntarily turned them over. This must be deemed a complete waiver. Original counsel's responsibility was to determine the privileged status of Sea-Land's documents. Its decisions in this regard were binding on its client. Privilege claims cannot be reopened by retaining new counsel who read the privilege rules more broadly than did their predecessor.

The second group of documents was marked by original counsel with a "P." When the Antitrust Division received them it thought something might be amiss and promptly asked original counsel whether the set had been disclosed by mistake. Counsel investigated and explicitly, even though mistakenly, advised that the documents were intended to be disclosed and that no privilege was accordingly claimed. It was not until March 1977 that original counsel discovered their mistake, so advised the Antitrust Division, and indicated that a formal demand for return would be forthcoming. No such demand was made, however, until early 1978 after new counsel had been retained by Sea-Land. Sea-Land itself was first advised of the inadvertent disclosure in December of 1977. Since September 1976, the documents have been copied, digested and analyzed by the Antitrust Division, as well as periodically used in connection with the grand jury investigation. Several witnesses have been asked questions concerning the documents, including Mr. Halloran, a high official of Sea-Land who was represented by personal counsel and testified with respect to the documents pursuant to a related order of the District Court.

Assuming that these documents were in fact privileged prior to their disclosure to the Government—an issue not before this Court—it is clear that the mantle of confidentiality which once protected the documents has been so irretrievably breached that an effective waiver of the privilege has been accomplished. Because of the privilege's adverse effect on the full disclosure of the truth, it must be narrowly construed. *Underwater Storage, Inc.* v. *United States Rubber Co.*, 314 F. Supp. 546, 547 (D.D.C. 1970). An intent to waive one's privilege is not necessary for such a waiver to occur. *Id.*, at 549; *Daniels* v. *Hadley Memorial Hospital*, 68 F.R.D. 583, 587 (D.D.C. 1975). "A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not." 8 Wigmore, Evidence § 2327 (McNaughton rev. 1961). *See* McCormick, Evidence § 93 (Cleary ed. 1972). Moreover, "[a]ll involuntary disclosures, in particular, through the loss or theft of documents from

the attorney's possession, are not protected by the privilege, on the principle . . . that . . . the law . . . leaves to the client and attorney to take measures of caution sufficient to prevent being overheard by third persons. The risk of insufficient precautions is upon the client." 8 Wigmore, Evidence § 2325 (McNaughton rev. 1961). *See United States* v. *Kelsey-Hayes Wheel Co.*, 15 F.R.D. 461, 464-65 (E.D. Mich. 1954). Perhaps this latter rule should not be strictly applied to all cases of unknown or inadvertent disclosure; this, however, is not a case where any such exception would be appropriate. Here, the disclosure cannot be viewed as having been inadvertent in all respects. Original counsel knew that some papers marked "P" had been divulged. This production was brought to their attention on at least one occasion; each time, however, said counsel declined to assert the privilege. Similarly, the Government cannot be said in any way to have "compelled" Sea-Land or original counsel to produce privileged documents; and there certainly was here an adequate opportunity in September 1976 to claim the privilege. *Cf.*, *Transamerica Computer Co.* v. *IBM*, 573 F.2d 646, 651-52 (9th Cir. 1978).

To be sure, in the final analysis, the privilege is for the client, not the attorney, to assert. McCormick, Evidence § 92 (Cleary ed. 1972). Original counsel, however, acted as Sea-Land's agent in determining which documents would be produced pursuant to the subpoena and which documents would be withheld under the attorney-client privilege. Original counsel acted within the scope of authority conferred upon it, and Sea-Land may not now be heard to complain about how that authority was exercised.

Most importantly, it would be unfair and unrealistic now to permit the privilege's assertion as to these documents which have been thoroughly examined and used by the Government for several years. *See Underwater*

Storage Co. v. *United Rubber Co.*, *supra*, 314 F. Supp. at 549; *United States* v. *Kelsey-Hayes Wheel Co.*, *supra*, 15 F.R.D. at 464-65. The Government attorneys' minds cannot be expunged, the grand jury is familiar with the documents, and various witnesses' testimony regarding the papers has been heard. This is not a case of mere inadvertence where the breach of confidentiality can be easily remedied. Here, the disclosure cannot be cured simply by a return of the documents. The privilege has been permanently destroyed.

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1539 September Term, 1978

Filed May 1, 1979

In Re:

GRAND JURY INVESTIGATION OF OCEAN TRANSPORTATION, APPELLANT

BEFORE: Wright, Chief Judge; Bazelon, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb, and Wilkey, Circuit Judges

ORDER

The suggestion for rehearing *en banc* filed by appellant Sea-Land Services, Inc., having been transmitted to the full Court and no judge in regular active service having requested a vote with respect thereto, it is

ORDERED, by the Court, that appellant's aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam

FOR THE COURT:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Circuit Judge Robb did not participate in the foregoing order.